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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. [redacted] 90

MAGNOLIA MOTOR & LOGGING CO.,
a Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Ninth Circuit, entered after denial of rehearing on May 4, 1959, upholding the judgment of conviction of the United States District Court for the Northern District of California, Northern Division, entered September 30, 1957.

OPINIONS BELOW.

The memorandum and order of the District Court, filed March 18, 1957, reported in 150 Fed. Supp. 310, the memorandum and order of the District Court filed April 26, 1957, and the opinion of the United States Court of Appeals for the Ninth Circuit filed March 24, 1959, are appended to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The date of the decree sought to be reviewed and the date of its entry are March 24, 1959. The denial of petitioner's Petition for Rehearing was filed May 4, 1959. No order granting an extension of time within which to petition for certiorari has been made.

The statutory provision believed to confer on this court jurisdiction to review the decree in question by writ of certiorari is the United States Code, Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Two fundamental questions for review are presented in this petition.

1. Is it a violation of due process and equal protection under the United States Constitution to charge, convict, and sentence under general Felony Sections 18 U.S.C.A. 641 and 18 U.S.C.A. 1361, where

the specific set of facts would be chargeable under the specific Misdemeanor Sections 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853?

Congress has enacted statutes which make it a misdemeanor to cut, remove, and dispose of timber and trees from public lands of the United States (18 U.S.C.A. 1852 and 18 U.S.C.A. 1853). In the present case appellant was charged, tried, convicted and sentenced for stealing and converting logs of the United States and for depredating real property of the United States (18 U.S.C.A. 641 and 18 U.S.C.A. 1361). Appellant was sentenced to pay a fine of $10,000 on each count. The evidence presented by the government during the trial was intended to show the cutting and felling of trees and the removal and sale of the logs.

Where two statutory provisions apply to the same set of facts, one applying only to a specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general. *United States v. Chase,* 135 U.S. 255; *Ginsberg & Sons v. Popkin,* 285 U.S. 204; *MacEvoy v. United States,* 322 U.S. 102; *Price v. United States,* 74 Fed. 2d 120, and *Robinson v. United States,* 142 Fed. 2d 431.

Further, under the the doctrine enunciated by Mr. Justice Black in his dissent in the case of *Berra v. United States,* 351 U.S. 131, it is a violation of due process as protected by the Fifth Amendment to the United States Constitution to charge and convict under a specific set of facts, the violation of which

is either a misdemeanor or a felony, where the choice is left to the whim of the prosecuting authorities.

2. Were sufficient errors committed by the trial court, coupled with the acquittal of the sole acting officer and agent of appellant corporation, to negative any competent substantial evidence proving necessary criminal intent on the part of appellant?

A specific criminal intent is an essential element to be proved for a conviction of a violation of Sections 18 U.S.C.A. 641 and 18 U.S.C.A. 1361. *United States v. Lamb,* 150 Fed. Supp. 310; *Morrissette v. United States*, 342 U.S. 246. In its written opinion the Circuit Court of Appeals found this necessary criminal intent on the part of appellant corporation by imputing to it allegedly criminal activity of the co-defendant R. Drew Lamb. R. Drew Lamb was *acquitted* by the jury.

Under the doctrine expressed in the cases of *Manley v. United States,* 238 Fed. 2d 221; *Peveley Dairy Co. v. United States,* 178 Fed. 2d 363, and the dissent in *Dunn v. United States,* 284 U.S. 390, 399-407, where verdicts are obviously inconsistent, they are stripped of all semblance of logic or reason and a reviewing court is required to be extraordinarily careful to scrutinize the entire record to ascertain any prejudicial error, and if such prejudicial error exists to reverse the verdict of guilty.

Not only was it error to impute activity carried out solely by the co-defendant Lamb to prove criminal intent on the part of appellant, but there were

sufficient other prejudicial errors to compel a reversal.

This raises the following corollary questions:

1. Is the conviction of a corporation consistent with the evidence where there is an acquittal of the *sole* officer or agent responsible for the acts and policies of the corporation?

2. Was it error for the court to instruct the jury as follows:

The Court. As a matter of law, this particular unsurveyed land, which did exist, belonged to the United States of America. That is a legal fact. You are not required to find legal facts, and perhaps I should have told you this before: A legal fact is a legal conclusion and the legal conclusion dictated by the facts here as to the ownership of this land is that it belonged, as part of the public domain, to the United States of America, and not only belonged to the United States of America, but belonged to it from the day when the treaty with Mexico was effected around 1850, when California became a state. That is a legal fact.

It is also true that as a matter of law the area being in the public domain could not be rented, conveyed out of Government ownership into private ownership until such a time as the land was surveyed and the survey was accepted and filed on the official record with the Bureau of Land Management of the Department of Interior or the Federal Government. When that was done, the individual sections and sub-

divisions of this area could then be identified for the purpose of describing townships and sections and the like, and could be incorporated into legal documents called patents or deeds, but the disposal features—the means by which the Federal Government can dispose of public land by conveying them to private individuals by way of patent—is an interesting subject, but it isn't particularly relevant to what we are here dealing with. Here basically the question for you to decide is whether or not the defendant knew or honestly believed that he or the corporation owned this particular area. He might have been mistaken and would have been mistaken if he so believed because it did in fact belong to the United States; but, if from where he stood and looked he believed honestly that it belonged to him and that he was justified in acting as he in the corporation did, then, of course, there's absent and lacking any criminal intent; and, under those circumstances, the verdict required by the law must be not guilty. On the other hand, if the defendant knew or should know from all the signs and surrounding circumstances that at least neither he nor the corporation owned this land, even though he didn't know who owned it, if he knew and it knew it didn't own the land, but nevertheless these acts were performed with the intent to deprive whoever owned the land permanently of these logs, or, if regardless of who owned the land there was an intent to despoil this forest area, and that the defendant did these acts knowingly, willfully, deliberately, purposely, well knowing the law prohibited the doing of these acts regardless to whom

this property belonged, then under those circumstances, you have present at the time of the doing of these acts the element of criminal intent, and under those circumstances, the verdict required by law is one of guilty.

3. Was it prejudicial error for the trial court to refuse to admit into evidence defendant's Exhibit "H," which was a letter written by a responsible agent of the United States Bureau of Land Management, the governmental body charged with administering the public lands of the United States, which letter admitted that there was no official knowledge of the alleged hiatus?

STATEMENT OF CASE.

Appellant is a corporation. It, and its president and managing officer, R. Drew Lamb, were indicted in two counts. Count I alleged that between the 1st day of June, 1953, and the 30th day of December, 1954, in the County of Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this court, the defendants hereto did knowingly, wilfully and unlawfully steal and convert to their own use personal property of the United States, said personal property being more particularly described as follows: Approximately 10,300 fir, cedar and hemlock logs of a value of more than $100. Count I charged a violation of 18 U.S.C.A. 641.

Count II alleged that between the 1st day of June, 1953, and the 30th day of September, 1954, the defendants hereto did knowingly, wilfully and unlawfully depredate certain property of the United States, to wit: Real property in the County of Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this court, described as follows: Portions of Sections 33 and 34, Township 11½ North, Range 3 East, Humboldt Meridian; that said depredation exceeded the sum of $100. Count II charged a violation of 18 U.S.C.A. 1361.

The evidence produced by the government to support these charges showed that at some time between June 1, 1953, and December 30, 1954, the appellant had logged a quantity of standing timber from an area which was on *March 30, 1956,* officially designated as Township 11½ North, Range 3 East, Humboldt Meridian. The only substantial evidence produced showed that the appellant acted by and through Lamb and that all things done were done by Lamb wilfully and knowingly.

Following a trial by jury a verdict was rendered finding Lamb not guilty on each count of the indictment and finding appellant guilty on each count. A judgment of conviction was entered sentencing appellant to pay a fine of $10,000 on each count.

Township 11½ North is a strip of land lying between Township 12 North and Township 11 North, Range 3 East, Humboldt Meridian.

In 1882, a Government surveyor named Hahn surveyed said Township 11 North. In the same year a Government surveyor named Foreman surveyed said Township 12 North using the Hahn north boundary of Township 11 as the south boundary of Township 12. In 1883, the plat of the Foreman survey of Township 12 was approved by the United States Surveyor General. In 1884, because of fraudulent survey work, both the Hahn and Foreman surveys were suspended.

In 1886, a resurvey was made of said Township 11 North by a Government surveyor named Gilcrest. In 1889, the Gilcrest survey of Township 11 was officially approved by the Surveyor General. In 1896, the said Foreman survey of Township 12, which previously had been suspended by the Surveyor General, was reinstated. This resulted in the two townships having a common boundary line according to plat.

Between 1901 and 1908, the United States issued patents in certain sections of Townships 11 and 12 North, Range 3 East-H.M. In at least one instance a single patent was issued containing contiguous parcels of land in both townships.

In 1926, a Government surveyor named Joy retraced portions of the Gilcrest North boundary of said Township 11 and apparently found discrepancies which he reported.

In 1950, R. Drew Lamb commenced negotiations for the purchase of a large tract of land in Hum-

boldt County, California, a portion of which is the specific area set forth in the bill of particulars filed by the Government. On July 15, 1950, a contract of sale was entered into whereby Magnolia Lumber Sales Co., an Oregon partnership, of which Lamb was the managing partner, purchased approximately 10,000 acres of timber land in this area from Arrow Mills Co. Following this, the appellant Magnolia Motor & Logging Co., a corporation, qualified to do business in California and was engaged by the said Magnolia Lumber Sales Co. as an independent contractor to log its timber.

In the instant case, the record stands uncontradicted that Lamb, president of appellant and managing partner of Magnolia Lumber Sales Co. after the purchase of the property from Arrow Mills Co., but before any logging was done, had Mr. William Briggs, attorney at law, Ashland, Oregon, who was attorney for R. Drew Lamb, Magnolia Lumber Sales Co., and appellant Magnolia Motor and Logging Co., phone the U. S. Government land office in San Francisco and discussed the alleged hiatus with the regional chief, Bureau of Land Management, Mr. Carl S. Swanholm, who advised: "Mr. Briggs, there is no gap, according to our records they do join." Thereafter, Mr. Briggs phoned the Bureau of Land Management office in Sacramento and was advised ". . . that their plats showed no gap and they also confirmed the fact that the government . . . couldn't lay any claim to it because the gap doesn't exist." Thereafter, Mr. Briggs reported this infor-

mation to Mr. R. Drew Lamb. In addition, Mr. Briggs contacted Belcher Abstract and Title Company of Eureka, California, which would not insure title to the "unsurveyed strip" although they didn't think there was anything to worry about. Mr. Briggs informed Mr. Lamb that the information he had was that the corners were together and that they (the Government) said there was no gap.

Arrow Mills Company, the prior owners of the real property logged in the area in question and, in fact, reserved a portion of the timber when they sold the property involved to Magnolia Lumber Sales Co. At the time of the negotiations leading to the purchase of the real property from Arrow Mills Company by Magnolia Lumber Sales Co., Mr. Harry B. Jameson, president of Arrow Mills Company, informed Mr. R. Drew Lamb that Mr. Jameson and Mr. Clare Shumate on or about October 26, 1949, went to the office of the Bureau of Land Management in Glendale, California, and spoke to Mr. Paul Witmer, the gentleman in charge of that office. Mr. Witmer saw that Arrow Mills was the owner of the land on both sides of the so-called unsurveyed strip and said, ". . . obviously, it either belongs to one side or the other, and if you own both sides, it is yours. . . ."

Sidney Ainsworth, attorney at law, Ashland, Oregon, as attorney for the two defendants, went to Sacramento, California, to search the United States land records, and a search revealed that according to the official records, no hiatus existed, and a map

in the Bureau of Land Management office in Sacramento did not show the existence of a hiatus. This information was reported directly to the defendant, R. Drew Lamb.

The defendant, R. Drew Lamb, discussed the purported hiatus with his attorney, Mr. William Briggs, and Mr. Briggs' opinion was that the hiatus was a "myth" and there was nothing to it. In addition thereto, Mr. Lamb discussed the hiatus with Mr. Jameson, the president of the Arrow Mills Co., discussed the matter with Sidney Ainsworth, attorney at law, and further discussed the matter with Mr. Hopkins of Paragon Plywood and their attorneys, Mr. Wilson and Mr. Chamberlain, Port Angeles, Washington. He also was shown a letter dated October 1, 1951, addressed to Hammond, Jenson and Wallen, Mapping and Forestry Services, from Carl S. Swanholm, regional chief, Division of Cadastral Engineering, Bureau of Land Management, United States Department of Interior, which states in part: "The official record of survey in Townships 11 and 12 North, Range 3 East, Humboldt Meridian, California, does not reveal the existence of any hiatus, or unsurveyed land between these two townships. As this alleged hiatus is officially non-existent, no sales, rights, grants, or transfers can be executed therein. . . . Title to unsurveyed lands will vest in the United States."

In 1954, a Government surveyor, Roger F. Wilson, was directed to investigate the condition of the survey to see *if there was a hiatus* between the two

townships, and if he found one, to survey it. On *March 30, 1956;* after dates set forth in the indictments, the Wilson survey plat was filed and approved by the surveyor general; this plat created Township 11½ and for the first time effected a record hiatus between Townships 11 and 12, which, until that time, had of record enjoyed a common boundary line with no intervening area between them.

When all of the evidence presented during the trial is considered it is apparent that R. Drew Lamb, acting by and on behalf of the appellant corporation, acted on an honest belief, based on a thorough investigation, in reliance on advice of Government maps and officials and on advice of counsel, and formed an honest belief that the land in question belonged to appellant corporation and that there was a common line between the two townships and that no hiatus existed, and so believed, between the 1st day of June, 1953, and the 30th day of December, 1954. *There is no other competent or substantial evidence of a criminal intent on the part of appellant corporation.*

REASON FOR ALLOWANCE OF WRIT.

The Supreme Court of the United States should allow a review on writ of certiorari for two reasons: First, the Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this court and, secondly, the Court of Appeals has so far departed from recognized judicial precedence, or so far sanc-

tioned such a departure by the District Court, as to call for an exercise of this court's power of supervision.

If a review on writ of certiorari is granted in this case the United States Supreme Court will have before it an important question of law which has to date been passed upon only by the Court of Appeals for the Ninth Circuit. This court has determined that the United States may convict and sentence under the general felony theft statutes for the cutting and removal of timber from public lands even though Congress has enacted specific legislation making such course of action punishable only as a misdemeanor. For over 100 years convictions have been obtained under the misdemeanor sections, reserving to the government also the right to collect damages for the conversion of the timber.

Petitioner respectfully contends that the Circuit Court has erroneously upheld the use of 18 U.S.C.A. 641 and 18 U.S.C.A. 1361 where Congress has enacted specific misdemeanor sections, 18 U.S.C.A. 1852 and 18 U.S.C.A. 1853, to cover the course of action charged against appellant. This is a pioneer case and the United States Supreme Court should review this conviction and determine whether or not there has been a circumvention of the intention of Congress and a violation of due process as protected by the Fifth Amendment of the United States Constitution.

The Honorable Supreme Court should also allow a review on this writ of certiorari because the Circuit Court and the District Court have seriously departed

from recognized judicial precedence in upholding a conviction of crimes requiring specific criminal intent, first, where the sole actor was acquitted and, secondly, where material prejudicial errors were committed by the court which in effect directed the jury to return its verdict of guilty.

As stated in *Mortenson v. United States,* 322 U.S. 369, a reviewing court has "never hesitated to examine a record to determine where there was any competent and substantial evidence fairly tending to support the verdict. *Abrams v. United States,* 250 U.S. 616, 619, 40 S. Ct. 17, 18, 63 Law. Ed. 1173." Petitioner respectfully contends that there is a complete lack of competent and substantial evidence showing an independent criminal intent on the part of appellant corporation.

The Circuit Court based its finding of criminal intent entirely on the actions of R. Drew Lamb which criminal intent was then imputed to petitioner corporation. Petitioner recognizes that the Supreme Court has ruled that consistency in verdicts is not required. However, there must be competent and substantial evidence upon which to support a conviction and petitioner respectfully contends that the acquittal of Lamb wiped out any independent criminal intent of petitioner. There is no proof of any activity or intent on the part of any other agent, officer or actor who is responsible for the acts and policies of the corporation. This is confirmed by the opinion of the Court of Appeals. The conviction of the corporation must be based on evidence outside the facts so conclusively

negatived by the acquittal of Lamb. There is no such evidence in this case.

Further, the Circuit Court failed to discuss and pass on certain prejudicial errors raised by petitioner in its appeal, thus departing from the doctrine established in *Manley v. United States*, 238 Fed. 2d 221. The instruction set forth heretofore in Questions Presented for Review in effect instructed the jury to disregard the fact that the survey of the alleged hiatus was not made until 1954 and that Township 11½ was not created until the filing of the survey on March 30, 1956, almost two years after the alleged crime was committed.

In determining the issue of criminal intent the jury had a right to consider all of the facts as they related to the title to the land in question. The trial court instructed the jury to disregard all consideration of the survey and possible belief that appellant might have formed that it owned the land, because "as a matter of law, this particular unsurveyed land, which did exist, belonged to the United States of America." There is no question that if unsurveyed land did exist that it belonged to the United States but the instruction as given, and at the time given, when the jury had announced it was hopelessly deadlocked, in effect, took from the jury the right to consider that the survey creating the land was not filed until two years after the alleged crime was committed and that neither the petitioner corporation nor the responsible agents of the United States government knew of the alleged hiatus.

Defendant's Exhibit "H" was a letter written by a responsible agent of the United States Bureau of Land Management, the governmental body charged with administering the public lands of the United States, which letter admitted that there was no official knowledge of the alleged hiatus. The purpose of admitting such document was to corroborate the prior testimony of defense witnesses who testified that there was a complete lack of knowledge of the existence of the hiatus on the part of the government prior to and during the times charged in the indictment. It was prejudicial error for the court to refuse to admit into evidence any matter which was relevant in proving a lack of criminal intent on the part of petitioner.

The United States Supreme Court should grant this petition for writ of certiorari and review the entire record from which it will be readily seen that the trial court committed substantial prejudicial errors, and that the Court of Appeals for the Ninth Circuit has disregarded judicial precedence in imputing the criminal intent of the co-defendant to petitioner corporation.

The courts, thus, held petitioner to a far higher degree of knowledge than the governmental body charged with the administration of the public lands in finding that petitioner had a criminal intent to steal personal property of the United States and depredate public lands—lands which the government did not know it owned and which petitioner, through R. Drew Lamb, its President and sole acting officer and agent, made every effort to ascertain the true owner-

ship, and after such study and a reliance on government maps and advice of governmental officials, acted on an honest belief that it had a right to cut and remove timber.

Dated, Sacramento, California,
May 28, 1959.

Respectfully submitted,

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(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

MAGNOLIA MOTOR & LOGGING CO., a Corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,805 March 24, 1959

Appeal from the United States District Court
for the Northern District of California,
Northern Division.

Before MATHEWS and HAMLEY, Circuit Judges, and ROSS, District Judge.

MATHEWS, Circuit Judge.

On February 8, 1957, in the United States District Court for the Northern District of California, Northern Division, R. Drew Lamb and appellant, Magnolia Motor & Logging Company, a Mississippi corporation, were indicted in two counts.

Each count alleged: "That the defendant, Magnolia Motor and Logging Co. [appellant], is a corporation organized and existing under the laws of the State of Mississippi; that the defendant, R. Drew

Lamb, is the president of said corporation and at all times herein mentioned was acting within the course and scope of his employment as such president."

Count I alleged: "That between the 1st day of June, 1953, and the 30th day of December, 1954, in the County of Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this [the District] Court, the defendants hereto [Lamb and appellant] did knowingly, willfully and unlawfully steal and convert to their own use personal property of the United States, said personal property being more particularly described as follows: Approximately 10,300 fir, cedar and hemlock logs of a value of more than $100." Thus count I charged a violation of 18 U.S.C.A. § 641.[1]

Count II alleged: "That between the 1st day of June, 1953, and the 30th day of September, 1954, the defendants hereto [Lamb and appellant] did knowingly, willfully and unlawfully depredate certain property of the United States, to-wit: Real property in the County of Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this [the District] Court, described

[1]Section 641 provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, * * * any record, voucher, money, or thing of value of the United States * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *"

as follows: Portions of Sections 33 and 34, Township 11½ North, Range 3 East, Humboldt Meridian; that said depredation exceeded the sum of $100." Thus count II charged a violation of 18 U.S.C.A. § 1361.[2]

Defendants (Lamb and appellant) moved to dismiss the indictment. That motion was denied.[3] Thereafter defendants pleaded not guilty and moved for a bill of particulars. That motion was granted to the extent of requiring the Government to describe "the area or areas where the charged depredation [was] alleged to have occurred, so that such areas [could] be located with reasonable certainty upon the terrain involved in this case." Accordingly, the Government filed a bill of particulars wherein the areas alleged to have been depredated were described as follows:

"1. A portion of the drainage of the west fork of Pecwan Creek in and near the common boundary of Sections 33 and 34, and contiguous to the north and south boundaries of said Sections in Township 11½ North, Range 3 East, Humboldt, Base and

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[2]Section 1361 provides:

"Whoever willfully injures or commits any depredation against any property of the United States • • • shall be punished as follows:

"If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

[3]United States v. Lamb, D.C.N.D.Cal., 150 F. Supp. 310.

Meridian, comprising approximately 40 acres, more or less.

"2. A portion of the principal drainage of Buzzard Creek in Section 34, Township 11½ North, Range 3 East, Humboldt Base and Meridian, contiguous to the south boundary of said Section and Township, comprising 10 acres, more or less.

"3. A portion of a minor drainage of Buzzard Creek in said Section 34, lying east of the said principal drainage, contiguous to the south boundary of said Section and Township, comprising approximately 2 acres."

Thereafter defendants had a jury trial. The jury rendered a verdict finding Lamb not guilty on each count of the indictment and a verdict finding appellant guilty on each count. A judgment of conviction was entered, sentencing appellant to pay a fine of $10,000 on each count. This appeal is from that judgment.

I

Appellant contends that the District Court erred in denying the motion to dismiss the indictment. The stated ground of that motion was, in substance, that neither count of the indictment charged an offense against the United States. Actually, as stated above, count I charged a violation of 18 U.S.C.A. § 641, and count II charged a violation of 18 U.S.C.A. § 1361. Obviously, these violations constituted offenses against the United States. Hence the motion to dismiss the indictment was properly denied.

II

Appellant contends that the District Court gave, and erred in giving, the following instruction to the jury: "You are instructed that the land now known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, is and was the property of the United States during the periods of time charged in the indictment."

Actually, that instruction was not given. Instead, the jury was instructed as follows: "As a matter of law, this particular unsurveyed land,[4] which did exist belonged to the United States of America. This is a legal fact. You are not required to find legal facts, and perhaps I should have told you this before: A legal fact is a legal conclusion, and the legal conclusion dictated by the facts here as to the ownership of this land is that it belonged, as part of the public domain, to the United States of America, and not only belonged to the United States of America, but belonged to it from the day when the treaty with Mexico[5] was effected around 1850 when California became a State. That is a legal fact."[6]

Thus, in effect, the jury was instructed that Township 11½[7] was at all pertinent times the property of the United States.

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[4]Meaning Township 11½ North, Range 3 East, Humboldt Base and Meridian.

[5]Meaning the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922.

[6]This instruction is found in the supplemental transcript of record filed here on January 2, 1959.

[7]Wherever used in this opinion, the phrase "Township 11" means Township 11 North, Range 3 East, Humboldt Base and Meridian;

Appellant contends that whether Township 11½ was the property of the United States was a question of fact to be determined by the jury. There is no merit in this contention. The evidence conclusively showed that Township 11½ was at all pertinent times the property of the United States. The jury was properly so instructed.

Township 11½ is a tract of land.[8] Its length (east to west) is slightly more than six miles. Its average width (north to south) is slightly more than a quarter of a mile. It consists of six sections (31, 32, 33, 34, 35 and 36) and has a total area of 1,007.23 acres. It was not surveyed until 1954[9] and, until surveyed, was not called Township 11½. However, regardless of what it was called, it was at all pertinent times, before as well as after the survey, the property of the United States.

Prior to 1954, there were Government maps which indicated that the north boundary of Township 11 was the south boundary of Township 12. The fact, however, was and is that, in 1954 and at all times prior thereto, the tract of land now called Township 11½ lay between Townships 11 and 12.[10] Government maps could not and did not alter that fact.

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the phrase "Township 11½" means Township 11½ North, Range 3 East, Humboldt Base and Meridian; and the phrase "Township 12" means Township 12 North, Range 3 East, Humboldt Base and Meridian.

[8]Township 11½ lies between Townships 11 and 12. Thus the north boundary of Township 11 is the south boundary of Township 11½, and the south boundary of Township 12 is the north boundary of Township 11½.

[9]The 1954 survey was not approved until March 30, 1956.

[10]See footnote 8.

III

Appellant contends that the evidence was insufficient to sustain its conviction. There is no merit in this contention. There was substantial evidence that appellant, acting by and through Lamb, its president and duly authorized agent, committed each of the offenses charged in the indictment.

The verdict finding appellant guilty on each count of the indictment was inconsistent with the verdict finding Lamb not guilty on each count. Appellant therefore contends that Lamb's acquittal showed that the evidence was insufficient to sustain appellant's conviction. There is no merit in this contention.[11] Consistency in verdicts is not required.[12]

Appellant contends that the evidence was insufficient in that it failed to show that appellant had any criminal intent. There is no merit in this contention. There was substantial evidence that Lamb, appellant's president and duly authorized agent, acting for and

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[11]See United States v. Dotterweich, 320 U.S. 277; United States v. General Motors Corp., 7 Cir., 121 F. 2d 376; American Medical Assn. v. United States, D.C. Cir., 130 F. 2d 233; Southern Advance Bag & Paper Co. v. United States, 5 Cir., 133 F. 2d 449.

[12]See cases cited in footnote 11. See also Dunn v. United States, 284 U.S. 390; Borum v. United States, 284 U.S. 596; Morrissey v. United States, 9 Cir., 67 F. 2d 267; Macklin v. United States, 9 Cir., 79 F. 2d 756; Maugeri v. United States, 9 Cir., 80 F. 2d 199; Long v. United States, 9 Cir., 90 F. 2d 483; Suetter v. United States, 9 Cir., 140 F. 2d 103; Audett v. Johnston, 9 Cir., 142 F. 2d 739; McElheny v. United States, 9 Cir., 146 F. 2d 932; Stein v. United States, 9 Cir., 153 F. 2d 737; Robinson v. United States, 9 Cir., 175 F. 2d 4; Catrino v. United States, 9 Cir., 176 F. 2d 884; Bridgman v. United States, 9 Cir., 183 F. 2d 750; Allen v. United States, 9 Cir., 186 F. 2d 439; Thomas v. United States, 9 Cir., 227 F. 2d 667; Bryson v. United States, 9 Cir., 238 F. 2d 657.

on behalf of appellant, stole and converted to appellant's use the property mentioned in count I of the indictment, depredated the property mentioned in count II[13] and did these things willfully, knowingly and with criminal intent. That criminal intent, if such existed, was imputable to appellant.[14]

There was substantial evidence that appellant, acting by and through Lamb, stole and knowingly converted to its use the logs described in count I of the indictment; that the logs were the property of the United States; and that their value exceeded the sum of $100. Appellant, however, contends that the logs were real property and, since real property cannot be the subject of larceny, contends that the evidence was insufficient to show a violation of 18 U.S.C.A. § 641. There is no merit in these contentions. The

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[13]The depredation shown by the evidence consisted of many acts, including the following: Entering upon and occupying the property without the consent of the United States; constructing and using roads on the property; operating motor trucks, tractors, bulldozers, donkey engines and other machinery thereon; conducting logging operations thereon; cutting and felling many thousands of trees growing and standing thereon; making saw logs from such trees; removing some of the logs from the property; leaving others to rot on the ground; covering much of the property with tree tops, branches and other waste material; failing to remove such material from the property; thereby creating a fire hazard and making it difficult to reseed the property; and, by these and other acts, greatly damaging the property and greatly diminishing its value.

[14]C.I.T. Corp. v. United States, 9 Cir., 150 F. 2d 85; Mininsohn v. United States, 3 Cir., 101 F. 2d 477; Egan v. United States, 7 Cir., 137 F. 2d 369; Old Monastery Co. v. United States, 4 Cir., 147 F. 2d 905; United States v. George F. Fish, Inc., 2 Cir., 154 F. 2d 798. See also United States v. New York Central Railroad Co., 212 U.S. 481; United States v. Union Supply Co., 215 U.S. 50; United States v. Illinois Central Railroad Co., 303 U.S. 239.

evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of the trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property.[15]

Appellant contends that the evidence, if it showed any violation by appellant, showed only a violation of 18 U.S.C.A. § 1852[16] or 18 U.S.C.A. § 1853.[17] There is no merit in this contention. As indicated above, there was substantial evidence that appellant, acting, by and through Lamb, violated 18 U.S.C.A. § 641 by stealing and knowingly converting to appellant's use the property mentioned in count I of the indictment and violated 18 U.S.C.A. § 1361 by depre-

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[15]See 52 C.J.S., Larceny, § 3, pp. 792-794.

[16]Section 1852 provides:

"Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or

"Whoever removes any timber from said public lands, with intent to export or to dispose of the same; or

"Whoever, being the owner, master, pilot, operator, or consignee of any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, knowingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom—

"Shall be fined not more than $1,000 or imprisoned not more than one year, or both. • • •"

[17]Section 1853 provides: "Whoever unlawfully cuts, or wantonly injures or destroys any tree growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

dating the property mentioned in count II. Neither § 1852 nor § 1853 says anything about stealing, converting or depredating property. Some of the acts constituting the depredation shown by the evidence[18] are mentioned in § 1852, but others are not. There was no evidence that appellant did any of the acts mentioned in § 1853.[19] In short, neither § 1852 nor § 1853 has anything to do with this case.

Other contentions of appellant are so obviously lacking in merit as not to require discussion.

Judgment affirmed.

(Endorsed): Opinion. Filed. March 24, 1959. Paul P. O'Brien, Clerk.

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[18]See footnote 13.

[19]It will be noted that § 1853 is applicable only to those who unlawfully cut or wantonly injure or destroy trees growing, standing or being upon the lands, reservations and allotments therein specified. There was no evidence that appellant cut, injured or destroyed any such tree.

[Title of District Court and Cause.]

Cr. No. 11800

MEMORANDUM AND ORDER

Defendants are charged by a two-count Indictment with:

(1) Knowingly, wilfully, and unlawfully stealing and converting to their own use personal property of the United States, to wit, "approximately 10,300 fir, cedar, and hemlock logs of a value of more than $100" in violation of Title 18 U. S. C. A. § 641;[1] and

(2) Knowingly, wilfully and unlawfully depredating certain real property of the United States within the jurisdiction of this Court in violation of Title 18 U. S. C. A. § 1361.[1]

Defendants have moved to dismiss Count I of the Indictment on the ground that it fails to state facts sufficient to constitute an offense against the United States, but the only real argument that they seek to advance in support of their motion is that the alleged offense (i.e., the unlawful stealing and conversion of logs) is not a violation of § 641, and may only be prosecuted under the provisions of §§ 1852 and 1853. Count II, defendants also contend, is defective in that it fails to state facts sufficient to constitute an offense against the United States, but as to this second count of the Indictment, defendants, as will appear later, actually do no more than complain that it is ambiguous.

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[1] In each instance in this opinion, when a section is referred to, it will be a section of Title 18 U. S. C. A.

It appears that on its face Count I of the Indictment alleges facts, which, if true, are sufficient to charge defendants with a violation of § 641. Defendants do not contend otherwise. In support of their motion to dismiss Count I of the Indictment, defendants argue that Congress has provided a specific and exclusive statutory penalty for the unlawful taking of timber from Government property (§§ 1852 and 1853), thereby making § 641 inapplicable to the instant case. Section 1852 prescribes a penalty for the cutting or wanton destruction of timber growing on the public lands of the United States, or, inter alia, for the removal of any timber from public lands "with intent to export or to dispose of the same." Section 1853 prescribes a penalty for the cutting or wanton injury or destruction of trees growing, standing or being upon lands reserved by law for public use or upon Indian lands. Section 641, so far as it is here applicable, applies to the theft of knowing conversion of any thing of value of the United States (meaning, in essence, any personal property of the United States, cf. Robinson v. United States, 142 F. 2d 431).

The principal issue, so far as Count I of the Indictment is concerned, then, resolves itself into the question of whether it was the intention of Congress that the taking of timber from Government property may be punished only under the provisions of § 1852 or § 1853, even though it would be possible under certain factual situations to construe the taking as a violation of § 641.

It is a well established rule of construction that where two statutory provisions apply to the same set of facts, one applying only to a specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general (United States v. Chase, 135 U.S. 255; Ginsberg & Sons v. Popkin, 285 U. S. 204; and Mac Evoy v. United States, 322 U. S. 102), and in the context of a criminal prosecution, the specific provision alone will be applicable (Price v. United States, 74 F. 2d 120, and Robinson v. United States, supra). However, it is an equally well established rule of construction that where two statutes, each proscribing some conduct not covered by the other, overlap, a single act may violate both, at least where there is some distinction between the elements of each offense, and the violator may be prosecuted under either (United States v. Beacon Brass Co., 344 U. S. 43; United States v. Gilliland, 312 U. S. 86; Toliver v. United States, 224 F. 2d 742, and United States v. Moran, 236 F. 2d 361).

By Count I of the Indictment presently before the Court, defendants are charged with knowingly, wilfully and unlawfully stealing and converting to their own use personal property of the United States. The personal property so stolen and converted is described in the Indictment as being approximately 10,000 fir, cedar and hemlock logs with an aggregate value in excess of $100. On a motion to dismiss an indictment on the ground that it fails to state facts sufficient to constitute an offense against the United

States, this Court is bound to accept as true all well pleaded facts set forth in the Indictment (Winslow v. United States, 216 F 2d 912, 913, and cases therein cited; United States v. Chrysler Corporation, etc., 180 F. 2d 557; United States v. Pennell, 144 F. Supp. 320). What the Government will be able to prove at a trial is one thing, but what is charged in the Indictment is quite another. It is only the latter with which the Court is now concerned.

It is the opinion of the Court that from the facts pleaded in the instant Indictment, all of the elements necessary to constitute a violation of § 641 are presented thereby. Furthermore, the Court is of the view that there is a sufficient distinction between the conduct prescribed by §§ 1852 and 1853, and that proscribed by § 641 to negate any intention on the part of Congress to make §§ 1852 and 1853 the sole sections applicable to timber even after the timber has been transmuted from real property into personal property (that is, from standing trees to logs or lumber).

Section 641 applies only to the stealing or conversion of personalty belonging to the United States, whereas § 1852 becomes applicable when the act of cutting, destroying or removing timber growing on the public lands of the United States is committed, and § 1853 becomes applicable when the act of cutting, injuring or destroying trees growing, standing or being upon any public or Indian lands is committed. It is fundamental that standing tim-

ber (this Court can see no legal distinction between growing trees and standing timber) is classified as realty (United States v. Shoshone Tribe of Indians, 304 U. S. 111, and Capoeman v. United States, 110 F. Supp. 924); hence § 641 (relating to personalty) could not be applied. Furthermore, in order to establish a violation of § 641, the theft or conversion must be shown to have been committed with a criminal intent, or "mens rea," i.e., with the knowledge that the taking is wrongful (Morissette v. United States, 342 U.S. 246); whereas, the only intent necessary to establish a "removal" or taking of timber under § 1852 is the intent to "export or dispose of the same" (cf. Teller v. United States, 113 F. 273, construing an earlier and slightly different statute), and § 1853 does not appear to require any specific intent at all. It is apparent that where § 1852 overlaps § 641, i.e., when it applies to severed timber (personalty) and the removal thereof (United States v. Schuler, 27 Fed. Case No. 16,234), it does not require all the attributes of criminal intent, indeed, the intent need not be wrongful at all. A similar legal situation seems to exist so far as § 1853 is concerned, although the possibility of such a situation is less clear since § 1853 is definitely limited to cutting, injuring or destroying trees. With the aforementioned points of difference in mind, the Court is of the view that Congress did not intend to preclude the application of the general larceny statute (§ 641) where the taking of logs is involved, and that where the facts

justify it, a prosecution under § 641 is equally as proper (perhaps even more so in some instances) as one under § 1852 or § 1853. The defendants' motion to dismiss Count I of the Indictment must, therefore, be denied.[2]

Defendants' contention that Count II of the Indictment is defective by reason of being couched in the terms of the statute is also without merit. There is nothing abhorrent about the use of the statutory language to charge the offense where, as here, the statute contains all of the elements necessary to constitute the offense (Brown v. United States, 222 F. 2d 293, 296, and cases there cited). Count II of the Indictment now before the Court sets forth a description of the property injured (real property) and the dates between which the depredation is alleged to have occurred. It further indicates in clear and unambiguous language that the depredation was wilful, and that the damage to the Government property exceeded $100. It is, therefore, patent

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[2]Defendants have called to the attention of the Court the case of United States v. Simpson, Cr. No. 17,903, in the United States District Court, for the District of Oregon, wherein the District Court there dismissed an Indictment for a violation, inter alia, of §641 charging the defendant with unlawfully, wilfully, feloniously and knowing embezzling, stealing, purloining and converting to his own use a quantity of standing timber valued in excess of $100 located on lands owned by the United States. Defendants' contention that the ruling in the Simpson case is determinative of the issues in the case at bar is without merit for the obvious reason that the Indictment in the case at bar does not attempt to make the theft or conversion of standing timber a violation of §641, but, on the contrary, charges defendants with the theft and conversion of logs, which under ordinary nomenclature, signifies severed timber (and therefore personal property) not standing trees.

that Count II of the Indictment satisfies the requirements of the law and sufficiently informs defendants of the nature of the charge against them. This is all that the defendants are entitled to (United States v. Debrow, 346 U.S. 374, 376, citing Hayner v. United States, 285 U.S. 427, 431; and Brown v. United States, supra; and cf. Rule 7(c), F.R. Cr. P.). Defendants' motion to dismiss Count II of the Indictment must also be denied.

It Is, Therefore, Ordered that defendants' motion to dismiss Counts I and II of the Indictment on file in this case be, and it is, denied as to each and both of said counts in the Indictment.

Dated: March 18, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Defendants have filed a motion for a bill of particulars seeking specific information concerning Count II of the Indictment, which alleges that defendants between the 1st day of June, 1953, and the 30th day of September, 1954, depredated certain property of the United States. Specifically, defendants seek a more detailed disclosure of the acts which constitute the offense charged by Count II, and the manner in which such acts were committed. Defendants have further indicated in open Court that the bill of particulars, if granted, should require plaintiff to set forth with a greater degree of particularity the situs of the depredations.

Plaintiff objects to the motion on two grounds, to wit: (1) that the motion was not timely made, and (2) that defendants have demonstrated no valid reason for obtaining such information in advance of trial.

The motion for a bill of particulars was filed on March 25, 1957, twenty-four days after the arraignment date. This is, however, the same date on which defendants' pleas of not guilty were entered. It does not necessarily follow from defendants' failure to file their motion within ten days of arraignment, that the motion is untimely, for Rule 7(f) of the Federal Rules of Criminal Procedure expressly gives the Court discretion to allow the filing of such a motion "at such other time before or after arraignment as may be prescribed by rule or order." The date on

which the motion in the instant case was filed should be considered in relation to the chronology of legal steps, which surround this prosecution from the date of indictment forward, and not as a disjunctive, isolated point of time unrelated to the orderly sequence of events. On March 1, 1957, defendants filed a motion to dismiss both counts of the Indictment, and the Court's ruling in this regard was not handed down until March 18, 1957. Within a week after having been apprised that the Government's Indictment was sufficient to withstand a motion to dismiss, defendants moved for a bill of particulars. Considered in this light, the motion for a bill of particulars, in the opinion of the Court, was not so untimely as to warrant the Court in making a strict application of the ten-day rule set forth in Rule 7(f), supra.

The law is clear that a motion for a bill of particulars is addressed to the sound discretion of the Court (Nye & Nissen v. United States, 168 F. 2d 846, affirmed 336 U.S. 613; United States v. Chapman, 168 F. 2d 997; Himmelfarb v. United States, 175 F. 2d 924; Schino v. United States, 209 F. 2d 67), but should not be granted unless the information sought thereby is necessary to enable the defendant to adequately prepare against the possibility of surprise and substantial prejudice at the trial (Himmelfarb v. United States, supra; Schino v. United States, supra; Norris v. United States, 152 F. 2d 808; United States v. Baugh & Sons Co., 14 F.R.D. 331). However, the bill of particulars should not be utilized for the purpose of compelling the prosecution to disclose its whole

case in advance of trial by seeking a detailed explanation of the acts constituting the offense (United States v. Bryson, 16 F.R.D. 477). Furthermore, the Court must keep in mind that a bill of particulars should not have the effect of placing an unreasonable limitation on the scope of the Government's evidence (Mulloney v. United States, 79 F. 2d 566; United States v. Baugh & Sons Co., supra).

With these general principles in mind, the Court does not feel that in this case the Government should be required to disclose the acts of depredation it intends to show at the trial, nor the manner in which such acts were committed. However, the Court is of the view that defendants should be appraised of the location or locations where the depredations occurred with a reasonable degree of exactitude. The description of the property given in the Indictment is in such general terms, and covers such a broad geographical expanse, that it cannot be said with fairness that defendants can adequately prepare a defense based on such description alone. Therefore, the Government should locate on the terrain itself, by description, the area or areas, in which the alleged depredation by defendants occurred, with a reasonable degree of certainty.

It Is, Therefore, Ordered that defendants' motion for a bill of particulars be, and it is, hereby granted insofar as the Government, as plaintiff in this case, is required to provide the defendants with a description of the area or areas where the charged depreda-

tion is alleged to have occurred, so that such areas can be located with reasonable certainty upon the terrain involved in this case;

And It Is Further Ordered that defendants' motion for a bill of particulars be, and it is, hereby denied in all other particulars.

Dated: April 26, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed April 26, 1957.

United States Court of Appeals
for the Ninth Circuit

No. 15,805

Magnolia Motor & Logging Company,
Appellant,
vs.
United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

JUDGMENT

Filed and entered March 24, 1959
Paul P. O'Brien, Clerk

18 U.S.C. 641:

"Whoever embezzles, steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States . . . shall be fined not more than $10,000, or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both."

18 U.S.C. 1361:

"Whoever wilfully injures or commits any depredation against any property of the United States, or of any department or agency thereof . . . If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000, or imprisonment for not more than ten years or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

18 U.S.C. 1852:

"Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or

Whoever removes any timber from said public lands with intent to export or to dispose of the same; or

Whoever, being the owner, master, pilot, operator, or consignee of any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, know-

ingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands."

18 U.S.C. 1853:

"Whoever unlawfully cuts, or wantonly injures or destroys any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 90

MAGNOLIA MOTOR & LOGGING CO., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 38–45; Pet. App. i–x)[1] is reported at 264 F. 2d 950. The memorandum opinion of the District Court, denying petitioner's motion to dismiss the indictment (R. 6–12; Pet. App. xi–xvii), is reported at 150 F. Supp. 310.

[1] "R." refers to the printed record in the Court of Appeals (consisting of the indictment, judgment, sentence, opinions and orders of the District Court, and other trial papers and pleadings), to which has been appended the proceedings in the Court of Appeals. "Tr." refers to the reporter's transcript of the trial proceedings, in 16 volumes. Volumes 1 through 11 are consecutively paginated and only the page number will be included when they are referred to. Volumes 12 through 16 are each separately paginated. Accordingly, references to these volumes will include the volume and page number.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1959 (R. 46). A petition for rehearing was denied on May 4, 1959 (R. 47). The petition for certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1852, forbidding the cutting or wanton destruction of timber growing on public lands, and the removal of timber with intent to export or dispose of the same, is the exclusive statutory sanction for the theft from public lands of logs belonging to the United States and for willful depredation of government property.

2. Whether the acquittal of petitioner's president and codefendant, through whom petitioner acted, requires reversal of petitioner's conviction.

3. Whether the trial court's instructions on the defense of honest mistake were erroneous.

4. Whether relevant and admissible evidence for the defense was erroneously excluded.

STATUTES INVOLVED

18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but

if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * *

18 U.S.C. 1361 provides in pertinent part:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, * * * shall be punished as follows:
>
> If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

18 U.S.C. 1852 provides:

> Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or
>
> Whoever removes any timber from said public lands, with intent to export or to dispose of the same; or
>
> Whoever, being the owner, master, pilot, operator, or consignee of any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, knowingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom—
>
> Shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> This section shall not prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in-

the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

STATEMENT

Count 1 of a two-count indictment (R. 3–5), filed February 8, 1957, in the United States District Court for the Northern District of California, charged petitioner, the Magnolia Motor & Logging Company, a corporation, and its president, R. Drew Lamb, with having stolen and converted to their own use, between June 1, 1953 and December 30, 1954, personal property of the United States, consisting of approximately 10,300 fir, cedar, and hemlock logs, in violation of 18 U.S.C. 641 (*supra*, pp. 2–3). Count 2 charged the same defendants with having, knowingly and willfully depredated, between June 1, 1953, and September 30, 1954, certain real property of the United States located in "Township 11½ North, Range 3 East, Humbol[d]t Meridian", in the Northern District of California, in violation of 18 U.S.C. 1361 (*supra*, p. 3). Following a trial by jury, the individual defendant, Lamb, was acquitted on both counts and the corporate defendant, petitioner, was convicted on both (R. 18). Petitioner was sentenced to pay a fine of $10,000 on each count (R. 24–25). On appeal, the Court of Appeals for the Ninth Circuit affirmed (R. 38–46).

The evidence adduced by the government may be summarized as follows:

The Bureau of Land Management, Department of the Interior, controls all federal public lands except those which have been specifically withdrawn from the public domain for use by another federal agency. In 1850, when California entered the union, the United States became the owner of all public lands that had belonged to Mexico before that time. This land, whether surveyed or not, still belongs to the United States and is subject to the control of the Land Bureau to the extent that it has not otherwise been sold, disposed of, or reserved for other purposes (Tr. 12–15, 59–60, 72–73).

Townships 11 and 12 North, Range 3 East, Humboldt Meridian (in Humboldt County, California)—between which the township here involved (numbered 11½) lies—were first surveyed in 1882 by two surveyors named Haughn and Foreman, who were contract employees of the Land Office.[2] Haughn surveyed Township 11, including its northern boundary (Tr. 41–42, 129). Foreman made a dependent survey of Township 12, which lay north of Township 11; *i.e.*, he worked from the northern boundary of 11, as estab-

[2] The method of survey and identification used by the government is as follows: Beginning with a given horizontal line (in this case, the Humboldt base line) and a given vertical line (in this case, the Humboldt meridian), the townships, which are normally six miles square in size, run north and south in tiers. The ranges run east and west. Each standard-sized township contains 36 sections, each section consisting of one square mile, or 640 acres (Tr. 32–35).

lished by Haughn, on the supposition that 11 and 12 had a common boundary (Tr. 129, 258).

The surveys of Townships 11 and 12 were suspended in 1884 because "an examination in the field [of Haughn's work] disclose[d] great irregularities" (Tr. 46, 130, 250–251). Thereafter, in 1886, the Land Office had Township 11 resurveyed by a surveyor named Gilcrest (Tr. 66). He established the northern boundary of Township 11 as being about one-quarter of a mile south of the line established by Haughn.[3] Since Gilcrest was not authorized to change the southern boundary of Township 12, and since Foreman's survey of Township 12 was reinstated in 1896, including his incorporation of Haughn's line as Township 12's southern boundary, this meant that a hiatus had developed between the townships. In other words, after Gilcrest's survey, the two townships had no common boundary, even though Gilcrest improperly marked[4] the northern boundary of Township 11 as though it was common with the southern boundary of Township 12 (Tr. 66, 131, 233, 274–277, 315–317).

Although this hiatus was not actually surveyed until 1954, and was not a matter of record within the Bureau of Land Management as a part of the sur-

[3] According to his field notes, Gilcrest never found the original boundary (Tr. 317–318).

[4] In modern times, the surveyor sinks a long pipe fitted with a brass cap into the ground at the corners (including interior corners) of the area he surveys. In earlier days in California, the surveyor would blaze trees, called witness or bearing trees, or, as shown by Gilcrest's field notes, sink corner posts (Tr. 10[illegible] 145–146; 13 Tr. 26–27, 43).

veyed public lands until March 30, 1956, when the survey was approved, a comparison of the plats of Townships 11 and 12 indicated the existence of unsurveyed land between them, since the shift in course of geographical figures, such as rivers, showed that they were not contiguous (Tr. 223–224, 388–389).[5] In addition, prior to the survey in 1954, the strip of land in question was shown as an unsurveyed area on maps having wide distribution. California State forestry maps, Department of Agriculture forestry maps, the county assessor's official atlas, and the Metsker Atlas of Humboldt County[6] all showed an outline of this strip as unsurveyed (and hence government-owned) land (Tr. 108–110, 354–357, 363–365, 444, 446, 448). Surveyors in the area, both government employees and private individuals, had gone over the ground at different times, found the two sets of markers or monuments, and concluded that the commercial maps were correct in showing that Townships 11 and 12 did not have a common boundary and that there was an unsurveyed strip, six miles long and approximately one-

[5] To ascertain the status, ownership, and boundaries of a particular tract of land it is always necessary to look at the tract book, the survey plat, and the surveyor's field notes (Tr. 111), and if there are discrepancies in the written records, the latter must give way to evidence of corners in place in the field (Tr. 107).

[6] A commercial publication used by the title company which acted as escrow agent in connection with the purchase of Townships 11 and 12 by Magnolia Lumber Sales (of which the individual defendant, Lamb, was a partner) from the Arrow Mills Company (see *infra*) (Tr. 944–945, 1114–1115, 1222–1223).

quarter of a mile wide, between them (Tr. 127, 132, 148–149, 808–816, 826.)

In 1950, Magnolia Lumber Sales, a partnership, through R. Drew Lamb, its operating partner and the individual defendant in this case, purchased a large tract in Humboldt County, including Townships 11 and 12, from the Arrow Mills Company (Tr. 553, 1234–1235, 1240). Although the head of the Arrow Mills Company claimed that he thought that he owned the then unsurveyed strip here involved, since he owned the land on both sides of it, and so informed Lamb at the time the sale was negotiated (Tr. 1112, 1121, 1123, 1126), Arrow Mills in fact promised only a quitclaim deed to this strip in the contract of sale and did not purport to convey title to the strip in the deed (Tr. 1129, 1131). The title insurance company refused to insure title to the strip (Tr. 945). Petitioner's counsel later inquired at the Bureau of Land Management and was told that there was no official plat or survey showing the hiatus, but that if there was an unsurveyed strip in the tract, it would belong to the government (Tr. 917–918, 925-927, 942, 949–950). On this basis, counsel testified that he told Lamb that there was no official gap between the townships.

In December 1951, Magnolia Lumber Sales, through Lamb, contracted to sell from its tract 300,000,000 board feet of lumber over a ten-year period to the Paragon Plywood Corporation (Tr. 545, 573–574, 601-602, 624). Paragon was aware, at the time of the contract, that there was an unsurveyed strip of land in Magnolia's tract (Tr. 559, 563–565), since it had in-

quired of and received a letter from the Bureau of Land Management saying that, while there was no record of a hiatus between Townships 11 and 12, title to unsurveyed lands was in the United States and that application for a definitive resurvey could be made. Moreover, Paragon had a timber-stand survey made of the tract and the results of that survey showed the unsurveyed area. Both the letter from the Bureau of Land Management and the timber-stand survey were shown to Lamb during the contract negotiations (Tr. 621–622, 636–637, 645; Def. Ex. J).

Pursuant to Magnolia Lumber Sales' contract, petitioner, a corporation of which Lamb was president, was given the prime contract to conduct the logging operations (Tr. 1233–1234). This involved felling the trees and bucking them into suitable lengths, trucking the logs to a river and floating them to Klamath, California, there loading them on trucks, and trucking them to the Paragon Plywood plant (Tr. 1254). In preparation for this operation, Lamb, together with a Mr. Ritchie, petitioner's sub-contractor to fell and raft the timber, and a Mr. Ryerson, who had managed Arrow Mills' prior logging operations in Humboldt County, went over Townships 11 and 12 in a jeep (Tr. 577–579). Ryerson expressly called the attention of Lamb and Ritchie to the unsurveyed strip, saying, "This is approximately the area that the unsurveyed area is in. It starts about in here" (Tr. 584).

Ritchie moved into the tract and harvested timber from March or April until November, 1952 (Tr. 585, 587–588), and Lamb was present at the site for a day or two each week. The operations map used by both

Ritchie and Lamb showed the unsurveyed area (Tr. 586, 589–591, 675). When Ritchie reached the unsurveyed strip the following season, in August 1953, Lamb instructed him to log through the strip and to disregard it completely, stating: "You know me," "I will settle with them [the government] for a dollar or two a thousand [board feet] the way I have done before" (Tr. 666, 670–672).

In 1954, Ritchie's part of the operation was taken over by the Yellow Creek Logging Company, and at the beginning of the season Lamb told a Mr. Wallace, Yellow Creek's general manager, that there were 12 million board feet of timber in the unsurveyed strip and that he intended to finish harvesting the area. Lamb also showed Wallace the area on the map. (Tr. 676–677, 857, 862, 883.)

In June and July of 1954, the hiatus between Townships 11 and 12 was surveyed, platted, and identified by the Bureau of Land Management as Township 11½ North (Tr. 148, 165–166). The surveyor in charge, a Mr. Wilson, found that the true north boundary of Township 11, as established by Gilcrest, had been re-marked some ten to twenty years before 1954, and that the blaze marks on trees identifying the boundary were clearly evident (Tr. 149–150, 184–185, 199–204, 346). Wilson's group also carefully retraced the old Foreman-Haughn survey of the southern boundary of Township 12 (the north edge of the hiatus) looking for evidence of the original corners (Tr 377–378). The surveyors found five corners (out of thirteen) identifiable as having been established by Haughn and adopted by Foreman. They established the other

eight corners by proportion (Tr. 380, 392, 395). The surveying party noticed that the brush along this boundary had been cut within the preceding few months, and scribe marks were blazed on two trees along the line (Tr. 379, 382-383).

When the surveyors saw Yellow Creek loggers harvesting timber within the government-owned strip (continuing the work started by Ritchie the preceding season), they informed Wallace, Yellow Creek's general manager, that his loggers were felling government trees. When Wallace told Lamb of the presence of government surveyors in the area, and what they had told him, Lamb ordered Wallace to eject the surveyors from the Magnolia lands (Tr. 167–170, 383–385, 680, 704, 874-875, 877).

As a result of petitioner's logging operation, Township 11½ was denuded, without the government's permission, of merchantable timber worth approximately $20,000 (Tr. 172–173, 179–182, 426, 539–540, 517–518). The timber was not harvested in such a way as to leave the area in a condition suitable for the production of more timber, nor were the area's other values, such as its wild life, fish, and usefulness as a watershed, safeguarded (Tr. 432–433). The trees cut were not fully utilized, a large amount of debris was left on the ground so that seed would have little chance to grow, and the stream in the area was clogged with unrecovered logs (Tr. 434, 467).

ARGUMENT

The decision below is correct and further review by this Court is not warranted.

1. The gist of petitioner's first contention (Pet. 2–4, 14) is that 18 U.S.C. 1852 (*supra*, pp. 3–4)—making it a misdemeanor to cut or wantonly destroy timber growing on the public lands of the United States or remove timber from such lands with intent to export or dispose of the same—overlaps 18 U.S.C. 641 and 1361 (*supra*, pp. 2–3)—punishing, respectively, the theft of, and willful depredations against, any property of the United States. It is also contended that Section 1852, relating as it does to timber growing on the public lands of the United States (the subject matter of this case), is a more specific provision than either of the other two sections, relating generally as they do to any property of the United States, and that, under the principle that "[w]here two statutory provisions apply to the same set of facts, one applying only to a specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general" (Pet. 3), petitioner's offense, if any, was solely against Section 1852. Thus, it is argued that it was error to base this prosecution on Sections 641 and 1361, the more general statutes.[7] We submit that there is no neces-

[7] Petitioner also suggests that 18 U.S.C. 1853, as well as 18 U.S.C. 1852, overlaps Sections 641 and 1361 (see Pet. 3). However, Section 1853, by its terms, is limited to the cutting or injuring of trees growing upon lands of the United States which have been reserved or purchased by the United States for public use, or upon Indian reservations or lands occupied by an Indian tribe under the authority of the United States, or upon Indian allotments while title thereto is held in trust by the government or while the allotment is to remain inalienable by the allottee without the consent of the United States. The strip of land involved in this case falls into none of these categories.

sary overlap between these sections and that, in any event, prosecution under the general theft and depredation statutes would not be barred even if there were some overlap.

(*a*) 18 U.S.C. 641 provides in broad terms for the punishment of anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another" any "thing of value of the United States." As both the District Court and the Court of Appeals noted (R. 9, 43), this section applies only to the theft (or embezzling or conversion) of personal property belonging to the United States, and a criminal intent to steal is an element of the offense. *Morissette* v. *United States*, 342 U.S. 246, 247–273. The first portion of Section 1852, on the other hand, reaches anyone who "cuts or wantonly destroys any timber growing on the public lands of the United States." Since growing timber is real property and not personal property, *Northern Pacific Railroad* v. *Paine*, 119 U.S. 561, 564; *Capoeman* v. *United States*, 110 F. Supp. 924, 926 (W.D. Wash.), affirmed *sub nom. Squire* v. *Capoeman*, 220 F. 2d 349, affirmed, 351 U.S. 1, and since larcenous intent is not part of the offense defined by the first portion of Section 1852, that portion of Section 1852 and Section 641 plainly reach different kinds of proscribed conduct. The second portion of Section 1852, prohibiting simply the removal of any timber from public lands "with intent to export or to dispose of the same," does not, on its face, require the showing of the specifically larcenous intent required by Section 641. To find a defendant guilty under this part of Section 1852, the jury need

only find that he had a purpose to obtain the timber in violation of the law. *Teller* v. *United States,* 113 Fed. 273, 275 (C.A. 8).

With respect to count 2, charging petitioner with willful depredation against property of the United States in violation of 18 U.S.C. 1361 (*supra,* p. 3), it is to be noted that, as observed by the Court of Appeals (R. 43), the prosecution's evidence went far beyond showing the mere harvesting of timber. It was also shown that petitioner had, among other things, so despoiled the land itself by littering it with debris as to impede natural reseeding and its eventual restoration. These acts of despoliation were all harmful acts within the scope of Section 1361, forbidding willful depredation "against any property of the United States", but were outside the ambit of Section 1852, which is limited to the cutting, destruction and removal of timber.

More broadly, Section 1852 has been applied almost exclusively in cases where an entry has been made on public lands and the timber cut ostensibly for the purpose of clearing the land for cultivation, fencing, and establishing a homestead, but actually for the sake of the timber. In short, as the last paragraph of Section 1852 indicates, the intent of Congress in enacting this statute was to restrict the cutting of timber on public lands to cutting for the improvement of the land rather than for the timber itself. See *Shiver* v. *United States,* 159 U.S. 491, 497–499.

(*b*) In any event, the criminal statutes of the United States need not interlock, with no gaps or overlap. Many statutes do overlap, and it is not un-

common for a single act or transaction to violate more than one provision. *Harris* v. *United States*, 359 U.S. 19, 23; *Gore* v. *United States*, 357 U.S. 386, 389; *Pereira* v. *United States*, 347 U.S. 1, 8–9; *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *United States* v. *Noveck*, 273 U.S. 202. "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *". *Rosenberg* v. *United States*, 346 U.S. 273, 294 (opinion of Mr. Justice Clark).* In such a situation, the prosecution may be for a felony even though the government could have elected to prosecute for a misdemeanor. *United States* v. *Gilliland*, *supra*; *United States* v. *Noveck*, *supra*.

In this case, petitioner engaged in an unlawful course of conduct extending over a long period of time. A misdemeanor prosecution for cutting and removing timber would not have provided punishment for the harm done to the land itself, nor would it have taken into account the intent to steal. The prosecution for larceny and willful depredation, on the other hand, reached separate acts and aspects of a prolonged course of conduct. When the trees had been felled and bucked into log lengths, and the land littered and despoiled, the offense of depredation against property of the United States, proscribed by 18 U.S.C. 1361, was committed. The actual asporta-

*If the prosecution seeks to invoke both, the question which arises is one of double jeopardy, the answer depending upon whether each offense requires the proof of an ultimate fact not essential to the other. *Harris* v. *United States*, 359 U.S. 19, 23.

tion of the logs constituted the separate offense of theft of government property, in violation of 18 U.S.C. 641.

It is not enough to say, as petitioner does (Pet. 3), that the misdemeanor statute, Section 1852, is more specific than Sections 641 and 1361, the felony statutes.[9] Section 641 is specifically limited to larceny and other offenses of that type, and Section 1361 is limited to willful injuries and depredations. From this point of view, Section 1852 is broader than either, since it encompasses every sort of offense against timber on public lands, no matter how minor. However, the conduct proscribed by Section 1852 is less broad than petitioner's course of conduct. Petitioner did not merely cut or damage timber; it also damaged land. Petitioner did more than remove logs with intent to "dispose of" them; it stole them.

2. The jury's acquittal of petitioner's president, Lamb, does not require the setting aside of the verdict as to it, on the ground that the only criminal activities attributable to it were the activities of Lamb (Pet. 4–5). It has always been the rule that inconsistency in verdicts is not a ground for reversal of a conviction which is otherwise supported by the evidence. Whether a jury's inconsistent verdicts are the result of carelessness, or compromise, or a belief that the penalty should merely increase the cost of running the business, is immaterial. "Juries may indulge in precisely such motives or vagaries." *United States*

[9] The offenses defined by Sections 641 and 1361 are felonies except where the value of the property stolen or despoiled does not exceed $100 (see *supra*, pp. 2–3).

v. *Dotterweich*, 320 U.S. 277, 279; see *Hoag* v. *New Jersey*, 356 U.S. 464, 472; *Dunn* v. *United States*, 284 U.S. 390. The rule is not different when the only officer or officers through whom the corporation has acted are acquitted. As was said in *United States* v. *General Motors Corporation*, 121 F. 2d 376, 411 (C.A. 7), certiorari denied, 314 U.S. 618:

> The question on review should not be whether the verdict against the corporation is consistent with the acquittal of the individuals. Rather it should be whether the conviction is consistent with the evidence. In other words, we believe that the acquittal of the officers and agents, even if they had been the only persons through *whom the corporations could have acted*, should not operate without more to set aside the verdict against the corporations. * * * [Emphasis added.]

See also *American Medical Association* v. *United States*, 130 F. 2d 233, 252–253 (C.A.D.C.), affirmed, 317 U.S. 519; *Southern Advance Bag & Paper Co., Inc.* v. *United States*, 133 F. 2d 449, 450–451 (C.A. 5). Here, the evidence supporting petitioner's conviction on both counts is overwhelming.

3. Petitioner's contention (Pet. 16) that the trial court, by instructing the jury that the strip of land in question legally belonged to the United States, in effect told them to disregard petitioner's defense of honest belief that Magnolia Lumber Sales owned the entire timber area, including the unsurveyed strip, is without merit. The trial court instructed the jurors that the means by which the government disposes of

land was not particularly relevant to this case because (14 Tr. 36–37)—

> the question for you to decide is whether or not the defendant [Lamb] knew or honestly believed that he or the corporation owned this particular area. He might have been mistaken * * * but, if from where he stood and looked he believed honestly that it belonged to him and that he was justified in acting as he [and] the corporation did, then, of course, there's absent and lacking any criminal intent; and, under those circumstances, the verdict required by the law must be not guilty.

This instruction fairly posed the defense of honest mistake, and petitioner does not suggest any way in which it could have been improved. It informed the jury that an honest mistake as to ownership would negate criminal intent and require a verdict of not guilty.[10] See *United States* v. *Kemble*, 197 F. 2d 316, 321 (C.A. 3).

4. While cross-examining the prosecution's first witness (Walter Beck, the manager of the Sacramento office of the Bureau of Land Management (Tr.

[10] To suggest, as petitioner seems to (Pet. 16), that the official government survey, which was made in 1954 and approved in 1956, created the land in controversy, and that the land did not exist until that time, is manifestly untenable. The evidence clearly permitted the jury to find that Townships 11 and 12 had no common boundary, and that what is now Township 11½ was, at the time of the offenses charged, an unsurveyed strip of land between Townships 11 and 12, about which petitioner was fully cognizant. Township 11½ was not carved out of either Township 11 or 12. It was simply the official label attached to an existing, newly surveyed area. The fact that the official plat was not filed until 1956 obviously [cont'd]

2-3)), defense counsel referred to two documents (jointly identified in the record as Defense Exhibit H for identification (Tr. 83)) consisting of (1) a letter sent to the Bureau of Land Management, Washington, D.C., by someone who was not a party to this prosecution and not identified in the record, and (2) a reply to the letter sent by the Sacramento office on May 10, 1955 (Tr. 83-85). When the letters were offered in evidence as "negativing the Government's claim to ownership in the subject hiatus" (Tr. 85), the prosecution objected on the ground that the sender of the original letter had not been shown to be connected with either defendant, and that the reply had not been sent by the witness then testifying (Tr. 86). The trial judge excluded the exhibit on these grounds (Tr. 87). Petitioner's contention (Pet. 17) that the exclusion of this proffered exhibit was prejudicial is without merit. It was an appropriate exercise of discretion for the trial judge to exclude these proffered documents. In addition to their objectionable character as hearsay, even if it be assumed that the reply of the Sacramento Office of the Bureau of Land Management was to the effect that the land hiatus in question was not a matter of record, such a reply, even if it had come to petitioner's attention, could have had no tendency to engender in

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does not mean that the land in question was not in existence until then (Tr 1431-1432).

The patent to land in Townships 11 and 12, referred to by petitioner (Pet. 9), described contiguous tracts only if it is assumed that the townships had a common boundary. The patent itself did not describe the lands as contiguous (Tr. 340-348).

it, at the time of the acts of theft and depredation charged in the indictment, an honest belief that the hiatus did not exist, since the reply was not written until May 1955, several months after the offenses had been committed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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